Supreme Court, U. S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

BY THOMAS J. HOUSER
General Counsel

WILLIAM E. BLASIER
Associate General Counsel

JAN S. AMUNDSON
Assistant General Counsel

1776 F Street, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellant.

The National Association of Manufacturers (NAM) is incorporated under the laws of the State of New

York as a non-profit voluntary business association. The NAM represents approximately 12,000 members engaged in manufacturing and related businesses, whose employees comprise an estimated 78% of the nation's manufacturing work force. Many member firms receive foreign source income from foreign subsidiaries and operations.

This case presents to the Court for the first time, a challenge to the inclusion of specific foreign source dividends in the tax base for corporate income taxes. Appellant, Mobil Oil Corporation (Mobil), is not, however, challenging the theory of apportionment employed by Vermont, or its authority to tax the Appellant's intrastate or interstate activities, merely, the inclusion of foreign dividends. Many NAM members located in the forty-six states which have a corporate income tax, have interests similar to Appellant, and are concerned about the adverse impact of the inclusion of unrelated foreign source dividend income in the apportionable tax base for state income tax purposes. Constitutional mandates and recent Supreme Court decisions clearly favor Appellant's contentions. Due to the NAM's diverse membership base, we believe our filing a brief as *amicus curiae* offers a broad view of the significant issues raised in this appeal.

ARGUMENT

Due Process and Commerce Clause Considerations Prohibit Multiple Taxation and Favor Allocation of Unrelated Foreign Source Income

In 1970, 1971, and 1972, Appellant, Mobil, was engaged in interstate and foreign commerce. Mobil's activity in Vermont was limited to the wholesale and retail sale of petroleum products. Mobil paid Vermont

corporate income tax based on a three-factor formula. However, Mobil excluded from the tax base foreign source dividend income. In fact, Appellant does not challenge the State's authority to apportion the corporate income tax nor the formula employed by Vermont. The issue concerns the inclusion in the tax base of monies received as dividends from foreign subsidiary sources.

The power to regulate commerce is vested in the Congress as provided in Art. I § 8, Cl. 3 of the United States Constitution, "The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes." This is an area of national concern and the determinations of Congress pursuant to the Commerce Clause should not be menaced by inappropriate state actions. "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *National Bellas Hess Inc.* v. *Department of Revenue,* 386 U.S. 753, 760 (1967).

Implicit in the regulation of interstate and foreign commerce is the prohibition against multiple taxation. The test of this prohibition lies in the potential for multiple taxation and not the fact that certain aspects of commerce are subject to multiple taxation.[1] Preferably, the basis for taxation of foreign source income lies in the allocation of certain funds to the jurisdiction with the constitutionally required nexus or link. The state of commercial domicile is the logical juris-

---

[1] *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940).

diction. This is the situs where any benefits or services are offered to bring the monies under their taxing authority. It has long been recognized that the power of a state to tax requires some connection with the object of the tax. In *Miller Brothers Company* v. *Maryland,* 347 U.S. 340, 344 (1954), the Court refers to the "consistent adherence to one time honored concept: that due process requires some definite link, some minimal connection, between a state and the person, property, or transaction it seeks to tax." Use of the allocation theory is consistent with the concepts of due process and tax policy. Using the allocation approach, which is applied in some manner in twenty-six jurisdictions, the state which offers some benefit to the company may exercise its authority to tax.[2] In the instant case, Appellant, without inclusion of the dividends, is paying to Vermont its apportioned amount of tax dollars reasonably connected with any and all benefits or services which inured to Mobil by virtue of their wholesale and retail activities in Vermont. The foreign dividends bear no relationship to the State. The decision should not rest on whether the state of commercial domicile, in this instance New York, taxes the funds. It is their ability to tax coupled with the constitutional mandates supporting a sufficient nexus, which renders this jurisdiction as the appropriate taxing authority.

What portion, if any, of such funds are taxed by the allocable state is dependent upon their internal tax policy and should be free from self-serving interpretations of sister states which could result in unwarranted inclusion of these funds in their apportionment tax base. Further, this is not an impediment to national foreign commerce policy. Once foreign source income is received in the state of commercial domicile there is a basis for taxation due to benefits accruing to the company engaged in business in that state. Absent this link to these funds, only upon a showing that the foreign subsidiaries avail themselves of benefits from the other state, could a possible argument be based. No such showing has been made by Vermont.

[2] *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 125 F.2d 571 (C.A. 10th 1942), *cert. denied,* 316 U.S. 668 (1942).

Moorman v. Bair Does Not Resolve The Issue of What Funds Comprise the Tax Base For Apportionment

Moorman Manufacturing Co. v. *Bair,* 437 U.S. 267 (1978) which deals with the Iowa apportionment formula is not dispositive of the issues in this appeal. The issue in *Moorman* was the use of a single factor formula rather than the three factor formula used in Vermont. The Court declined to interfere with the Iowa apportionment formula. However, the formula, not the monies included in the formula, was the crux of that case. Thus, as Appellant is not challenging the basic formula, the *Moorman* case does not resolve the issue present in this appeal.

The *Moorman* opinion refers to potential multiple taxation due to the variance in state apportionment formulas. However, the distinguishing characteristic is that the potential for multiple taxation derives from various states' apportionment formulas of the funds brought within their jurisdiction by domestic interstate commerce. The tax does not fall upon foreign monies such as these which bear no relationship to the interstate activity Mobil carries on in Vermont. Any argument favoring the taxability of foreign source dividend income based upon the *Moorman* rationale is erroneous. The threat of multiple taxation referred to

is solely upon apportioned monies admittedly includable in the state formula. The opinion does not address the issue of what funds are includable in the formula, such as foreign source dividends.

The *Japan Line* Standards On the Risk of Multiple Taxation and the Impairment of Federal Uniformity In Foreign Commerce Are Violated By the Vermont Decision

The most recent articulation by this Court of foreign commerce considerations is *Japan Line, Ltd.* v. *County of Los Angeles,* —— U.S. ——, 47 U.S.L.W. 4477 (May 1, 1979). In this case the county levied a property tax on cargo containers of Japan Line which were owned by the company and subject to tax in Japan. The California Supreme Court upheld the ad valorem property tax which this Court conclusively reversed. The issues presented clearly align with the issues in the instant case. Generally stated, the issue is whether the subject property used exclusively in international commerce, although owned and operated by a foreign company, can be used in an apportioned ad valorem property tax by a state. This is analogous to this case. Although the dividends at issue are not tangible working assets of international commerce, they are the product of international commerce. The dividends were from foreign operating subsidiaries of the Appellant and were in no way connected to their domestic operations. In *Japan Line* the Court recognizes the need to scrupulously ascertain the propriety of a tax which taxes foreign rather than interstate commerce. Hence, the inquiry will be the same whether it pertains to cargo containers or dividends.

The Court recognizes that two considerations must be resolved before sanctioning taxation of foreign commerce. "The first is the enhanced risk of multiple taxation. It is commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause." (47 U.S.L.W. 447 at 4480). Secondly, the state tax must be valued against the federal foreign commerce policy, which being of national concern, may necessitate a uniform approach. As stated in *Board of Trustees* v. *U.S.,* 289 U.S. 48, 59 (1933), "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."

In resolving these issues it is essential that no greater deference be given to foreign companies engaged in international commerce and subjected to their domestic taxation than to domestic companies engaged in foreign commerce and their consequential tax ramifications to the federal government and various states. The federal government's interest in a unified approach to foreign commerce should not be frustrated by the interference of certain aspects of state taxation, particularly when the question of the taxing nexus or link is tenuous or lacking. "If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce." (47 U.S.L.W. 447 at 4482). Future potential for the stimulation of foreign commerce so essential to our economic stability would be hampered should states find foreign source dividend income a reservoir of revenue without meeting constitutional nexus standards and in complete disregard of the overall national policy.

This argument supports allocation of any such funds to the state of commercial domicile. In a policy argument, the overview of foreign commerce requires minimal interference by the states. Thus, the appropriate taxing authority is the state of commercial domicile, where all the incidents of control and investment are determined. The posture of national foreign commerce policy could be frustrated by constant attention to state claims for tax revenue from those companies engaged in interstate and foreign commerce, the latter having potentially no link to the taxing state. The logical extension of *Japan Line* would demand no less.

Of paramount importance in the *Japan Line* case is the distinction drawn between that case and *Moorman,* (*supra* p. 5). The opinion in essence confines the decision in *Moorman* to domestic income. "*Moorman,* finally, concerned interstate commerce. This case concerns foreign commerce. Even a slight overlapping of tax—a problem that might be determined *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." (47 U.S.L.W. 4477 at 4483).

Special Foreign Income Aspects Prohibit States From Taxing Unrelated Foreign Source Income

In *Japan Lines,* this Court required a more extensive inquiry for matters relating to foreign commerce than that applicable to domestic commerce. In regard to state taxes, a court must inquire ". . . whether the tax prevents the Federal government from 'speaking with one voice when regulating commercial relations with foreign governments.' " State policies which prevent the federal government from "speaking with one voice" are unconstitutional under the Commerce Clause, (47 U.S.L.W. 4477 at 4482).

The dividend income at issue here is the fruit of Appellant's activities overseas and within the State of New York. If Vermont is allowed to apportion to itself these dividends, there is nothing to prevent every state from apportioning foreign source income from any U.S. multinational which has some minor unrelated activity within the taxing state.

This result would run counter to federal policies to encourage U.S. investment abroad and the repatriation of earnings to U.S. shareholders. While taxes are only one of a number of considerations in the decision to invest or repatriate earnings, taxes remain a powerful influence. If Vermont is allowed to tax these earnings, no U.S. investor could reasonably know the extent of his state tax liability. A potential result would be a chilling of new U.S. investment overseas, both with respect to current and future projects. Whether this disincentive to investment would bring about some form of retaliation is speculative, but it is the *risk* of such retaliation that was held to be unconstitutionally repugnant in *Japan Lines* (47 U.S.L.W. 4477 at 4482).

A related problem is found with respect to the repatriation of earnings. The U.S. is not speaking with one voice to the foreign subsidiaries of U.S. companies, since no taxpayer can reasonably anticipate the tax consequences of repatriation of earnings. Under these circumstances, there may be an altered rate of repatriation until the issues are resolved with some certainty. In view of the federal intent in this area, such a result would be both undesirable and unconstitutional.

CONCLUSION

It is respectfully submitted that this case has presented issues crucial to the orderly flow of interstate and foreign commerce and has proven that to affirm the Vermont Supreme Court decision results in multiple taxation repugnant to the Constitution. Recent Court decisions substantiate these contentions. Based on the foregoing arguments we respectfully request that the decision be reversed.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

By THOMAS J. HOUSER
General Counsel

WILLIAM E. BLASIER
Associate General Counsel

JAN S. AMUNDSON
Assistant General Counsel

1776 F Street, N.W.
Washington, D.C. 20006